Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

ALLIED-BRUCE TERMINIX COMPANIES, INC., and TERMINIX INTERNATIONAL COMPANY,

Petitioners,

v.

G. MICHAEL DOBSON, WANDA C. DOBSON, STEVEN GWIN and JAN GWIN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the contract at issue here – a "termite protection plan" to provide pest control services in Alabama to an Alabama homeowner by a company operating locally in Alabama – is, under the particular facts of this case, a "contract evidencing a transaction involving commerce" within the meaning of Section 2 of the Federal Arbitration Act.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is substantially correct except in one respect. Petitioners assert, at page 5 of the Brief, that

> [r]ather than submit their complaints to arbitration, [Dobson] brought suit against petitioners in Alabama Circuit Court, asserting claims that petitioners had breached their duties under the termite protection plan and that they had negligently performed the visual inspection.

Actually, the Complaint, as initially filed by Dobson, contained claims against Terminix Service and Terminix International Company LP (hereinafter referred to as "Terminix International") only for misrepresentation based on a report or clearance letter furnished to Dobson following a pre-closing inspection of the house by Terminix Service; and for negligence or wantonness in connection with the inspection itself. (See Complaint at R. 1-5) No breach of contract claims were asserted by Dobson at that time. Neither Terminix Service nor Terminix International demanded arbitration at that time, but filed Answers to the Complaint. (R. 27-37 and 38-48) The litigation process was substantially invoked for a period of more than eight months when, on June 25, 1992, Dobson filed an Amended Complaint which, among other things, stated a claim against both Terminix Service and Terminix International for breach of contract. (See First Amended Complaint, R. 182-186) On August 14, 1992, both Terminix Defendants, for the first time, sought arbitration (R. 286-300), which request was denied by the Circuit Court of Baldwin County, Alabama, without statement of reasons. Dobson raised an issue on appeal to the Supreme

Court of Alabama concerning the proper scope of the arbitration clause, if valid at all, which issue was not reached by that Court. If the arbitration clause is binding on Dobson and if the tort claims are determined to be within the scope of that clause, then additional issues would be raised by Dobson concerning the timeliness of the request for arbitration, as to the tort claims.

REASONS FOR DENYING THE WRIT

The Petition should be denied because it does not raise issues that warrant review by this Court. The question presented here is whether the contract at issue in this case, a homeowner "termite protection plan," can be regarded as a "transaction involving commerce" under Section 2 of the Federal Arbitration Act.

In the discussion which follows, we first explain why such a local contract cannot be regarded as "involving commerce" under any test.

We then explain why Petitioners are simply wrong in suggesting that there exists a division of authority among state and federal courts as to the test to be applied in resolving this issue. An examination of the cases cited by Petitioners as evidence of that division of authority are not persuasive. While the rationale may vary somewhat from case to case, the result, in cases based on similar facts, is remarkably similar.

Nor are Petitioners correct in asserting that the decision below conflicts with the interpretation of Section 2 by this Court, particularly in *Perry v. Thomas*, 482 U.S. 483

(1987). We do not believe that *Perry* speaks to the issue of which transactions involve interstate commerce. Rather, we would suggest that *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), and *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956), are the relevant authorities on that issue and that the decision below is not in conflict with either.

I. THE CONTRACT AT ISSUE IN THIS CASE DOES NOT EVIDENCE A TRANSACTION INVOLVING INTERSTATE COMMERCE UNDER ANY TEST.

This case arises out of the purchase of a residential dwelling in Alabama by the Respondents, Dobson, residents of Alabama, from the Respondents, Gwin, also residents of Alabama. Their sales agreement required Gwin to transfer "[t]he current termite contract, if any" to Dobson.[1] The house was inspected by local employees of

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[1] The sales agreement also required Gwin to furnish written evidence from a termite control company that a visual inspection of the residence indicated that the dwelling was free from infestation by wood destroying insects and damage caused by a currently active infestation. Terminix furnished such evidence to Dobson, at closing. That evidence, and the inspection on which it was based, is the subject of claims by Dobson against Terminix for negligence, wanton misconduct and misrepresentation. (R. 1-5) Dobson contends that those tort claims arose prior to the time that there was any contractual relationship with Terminix and that those claims are, therefore, not within the scope of the arbitration clause. That issue was not reached by the court below.

Also, Dobson contends that because they did not sign the termite protection plan, but that it was transferred to them by the unilateral act of Terminix, at the request of Gwin, they are

Terminix Service (R. 1613-28) and Gwin's termite protection plan was transferred to Dobson by a typewritten notation on the face of the Gwin contract. (R. 1673) Before the Alabama Supreme Court, Petitioners pointed to four facts which, it was contended, evidence a transaction involving commerce. (A. 6a-7a)[2] First, Petitioners rely on the fact that Terminix Service is an Arkansas corporation and Terminix International is a limited partnership with its principal place of business in Memphis, Tennessee. Next, Petitioners argue that most of the materials and equipment, including specifically the chemicals used to treat the home involved here, were purchased by Terminix Service outside Alabama. (R. 272-73) Also, Petitioners argue that the termite protection plan contained language recognizing that Terminix performs its services in accordance with the requirements of federal, state and local law. (R. 279, para. 6) And, finally, it is contended that the Dobson contract involves commerce because Gwin, when they first bought the Terminix plan in 1987, did so out of a desire to "go with a national company like Terminix." (R. 1346)

We are aware of no decision holding that the mere fact that parties to a contract are residents of different states is, of itself, proof that their transaction involves commerce. *See Maxum Foundation, Inc. v. Salus Corporation*, 779 F.2d 974, 978 n.4 (4th Cir. 1985).

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not bound by the arbitration clause contained in the plan. That issue was also not reached by the court below.

[2] Citations to "A" are to the Appendix attached to the Petition for a Writ of Certiorari.

To the extent that chemicals may have been bought elsewhere and brought into Alabama for use in treating the Dobson home, that kind of activity is merely incidental to the transaction which is "evidenced by" the contract. Stated otherwise, there is nothing in the Terminix contract "evidencing" a contract to bring chemicals into Alabama. The transaction, as is plainly set forth in the plan, is for "the necessary service to protect the identified property against the attack of subterranean termites . . ." (R. 287) The heart of the transaction is the service provided, a purely local function, including the skill, expertise and knowledge necessary to see that the house is protected from termites. Obviously, that could, but would not necessarily, include the use of chemicals which might or might not be bought outside Alabama, just as the gasoline in the tank of the serviceman's truck might or might not be refined outside Alabama. There is nothing in the decisions of this Court or in the language or history of the Act, however, which indicate a Congressional intent to define the term "involving commerce" to such an extent. This same argument applies concerning the provision in the contract recognizing that the service provided by Terminix is performed in accordance with federal, as well as state and local laws.

Finally, the fact that Gwin may have been motivated by an uncommunicated desire to "go with a national company like Terminix" is not evidence that the transaction itself involves commerce. Also, Gwin's motivation can hardly be evidence of the nature of the transaction between Dobson and Terminix.

It is difficult to imagine a more local transaction than purchasing a home. The same is true of agreements to

service the home, including those to insure that it is free from termites. Now it is contended that this transaction involves interstate commerce. Without question, the parties to this transaction did not contemplate their involvement in interstate commerce. But, further, we submit that neither did their transaction have a "slight nexus" with commerce, regardless of what they contemplated.

II. THE CASES CITED BY PETITIONERS DO NOT SUPPORT THE CONTENTION THAT THERE IS A DIVISION OF AUTHORITY AMONG STATE AND FEDERAL COURTS CONSTRUING SECTION 2.

In support of its position that there exists a division of authority, Petitioners cite five cases illustrating the point that, on the one hand, most courts addressing the issue have held that the phrase "contract evidencing a transaction involving commerce" must be broadly construed.[3] An examination of the facts involved in those cases, however, leads to the conclusion that the underlying transaction in each case would likely be found to involve commerce, no matter what standard was applied. For instance, *Snyder v. Smith, supra,* after suggesting that

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[3] *Snyder v. Smith,* 736 F.2d 409 (7th Cir. 1984); *Societe Generale de Surveillance, S.A. v. Raytheon European Management and Systems Company,* 643 F.2d 863 (1st Cir. 1981); *Foster v. Turley,* 808 F.2d 38 (10th Cir. 1986); *Del E. Webb Construction v. Richardson Hospital Authority,* 823 F.2d 145 (1st Cir. 1987); *Woermann Construction Co. v. Southwestern Bell Tel. Co.,* 846 S.W.2d 790 (Mo.Ct.App., 1993). It should be noted that the *Woermann* decision is not from a "state court of last resort" within the meaning of Rule 10.1 of the Rules of the Supreme Court of the United States.

the "involving commerce" language of the Act was as broad as Congress' power to regulate under the commerce clause, held that

> [w]e need not decide today whether Congress intended the FAA to apply to all contracts affecting interstate commerce, for it is clear that the partnership agreement presented in this case falls well within the constitutional limits. The real estate at issue was located in Texas; the partners lived in, and the partnership was managed from, Illinois. The partnership borrowed money from and maintained a checking account with a bank in Illinois. Thus, the partnership agreement involved interstate commerce and the FAA is applicable. *Id.* at 418.

Foster v. Turley, supra, referred to the dicta in *Snyder* concerning the breadth of the "involving commerce" language before concluding that the Act applied to a partnership agreement to sell ore from a New Mexico mine "all over the country." 808 F.2d 38, at 40. And *Societe Generale de Surveillance, S.A., supra,* found the Act to apply to a contract between French and American companies concerning the transportation and testing in Europe of missiles made in California and Massachusetts. 643 F.2d 863, at 867. Therefore, these cases and the others cited in this line by Petitioners[4] are decided on facts

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[4] *Del E. Webb, supra,* another of the cases cited in this line by Petitioner, recognized that the term "involving commerce" had been held to mean more than transactions for the interstate shipment of goods and that it included contracts "relating to interstate commerce." 823 F.2d 145, at 147-48. But that case involved a contract to build an expansion and renovation of a medical center in Texas, requiring employees of the contractor

which clearly involve commerce, regardless of the test employed.

The opposing line of cases cited by Petitioners[5] does not take the narrow view of the meaning of the phrase "a transaction involving commerce" as is contended by Petitioners. Rather, the cases in that line adopt quite the opposite view. That is, while those cases do cite the concurring opinion of Judge Lumbard in *Metro Industrial Painting Corp. v. Terminal Construction Company, Inc.*, 237 F.2d 382 (2d Cir. 1961) (hereinafter referred to as "*Metro Industrial*"), they do so in an effort to *broaden* the construction of the term "involving commerce" not narrow it. For instance, in *Burke County, supra*, the issue involved the design of a school in North Carolina by a multi-state architectural firm. The North Carolina Court of Appeals had ruled that the Act did not apply because it did not

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to travel interstate and materials for the facility to be manufactured and moved interstate. *Woermann, supra*, relied on *Del E. Webb* to reach the conclusion that "construction contracts performed in one state which require materials from another state, fall under the umbrella of the FAA." 846 S.W.2d 790, at 793. *Woermann* then found the Act to apply to a construction contract for Southwestern Bell, in Missouri, where the mechanical equipment used in the project came from out of state.

[5] *Burke Co. Public Schools Bd. of Educ. v. Shaver Partnership*, 279 S.E.2d 816 (N.C. 1981); *Pathman Const. Co. v. Knox County Hospital Ass'n.*, 326 N.E.2d 844 (Ind.Ct.App. 1975); *R. J. Palmer Const. Co., Inc. v. Wichita Band Instrument Co., Inc.*, 642 P.2d 127 (Kan.Ct.App. 1982); *Loche v. Dean Witter Reynolds, Inc.*, 526 N.E.2d 1296 (Mass.App.Ct. 1988); *Lacheney v. Profitkey Int'l, Inc.*, 818 F.Supp. 922 (E.D.Va. 1993). We would note that of these decisions only *Burke County* is from a "state court of last resort" within the context of Rule 10.1 of the Rules of the Supreme Court of the United States.

involve or relate to the "actual physical interstate shipment of goods." *Id.* at 818-819. In reversing, the North Carolina Supreme Court held that the

> [r]eliance by Plaintiff and our Court of Appeals on *San Carlo Opera Co.*, [163 F.2d 310 (2d Cir. 1947)], is misplaced as the Second Circuit would in fact reject, as we do, the narrow view of the federal act's applicability fashioned by our Court of Appeals. *Id.* at 821.

The North Carolina Supreme Court went on to state its test, based on the concurring opinion in *Metro Industrial*, as follows:

> Where, however, performance of the contract itself necessarily involves, so that the parties to the agreement must have contemplated, substantial interstate activity, the contract evidences a transaction involving commerce within the meaning of the Federal Arbitration Act. *Id.* at 822 (footnote omitted).

R. J. Palmer Construction Company, supra, also illustrates the point that the courts in this line of cases see the "contemplation" standard as broader than the "slight nexus" or "involving-in-fact" standard. That case involved the construction of a building in Kansas using redwood siding, which, the Court found, the parties had contemplated being brought from out of state. The Court there went on to hold that

> [i]n addition, the building presumably was to be used to house and sell musical instruments and related items that would be moved in interstate commerce, a fact which would have been known to all parties when the agreement was entered into. *Id.* at 130.

That is, the Court, in effect, reasoned that even though there had apparently been no sale of goods, in fact, from the building, the parties had contemplated such sales and the transaction, therefore, would, in the future, involve commerce. In that situation, the contemplation standard is obviously broader, involving a more liberal application of the Act.

To the extent that any of the cases cited in this line by Petitioners depend for their result on the test employed, it seems clear that they relied on the contemplation standard to broaden, not narrow, the inquiry.[6] Significantly, each of the five cases cited by Petitioners as representing the "opposing view" found the Act to apply because the transaction at issue involved commerce. That does not indicate a line of authority holding to a "narrow view" of the statute. We submit that those cases do not represent a part of a trend to disregard a liberal federal policy favoring arbitration, but, to the contrary, are consistent with

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[6] *Lacheney v. Profitkey International, Inc., supra,* involves the same reasoning. There, the transaction involved a franchising agreement to sell computer software, although apparently none had, in fact, been sold. Nevertheless, the Court held, the parties contemplated such a sale and the Act applied. *Loche v. Dean Witter Reynolds, supra,* noted that the contract at issue there "contemplated a continuing investment relationship, much of it *necessarily* involving interstate commerce." *Id.* at 1300 (emphasis added). *Pathman Construction Company, supra,* expressly cited the concurring opinion in *Metro Industrial* for the proposition that "[i]n addition to *Prima* [*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)], numerous other courts have considered the question here presented and have generally held that the Act, in this respect, should receive a liberal construction." *Id.* at 852.

the *Snyder v. Smith* line of cases in their result and, for the most part, in their rationale. That they employ the contemplation of the parties rationale to reach that result does not constitute a "special and important reason" for this Court to grant the Writ to resolve a division of authority or lack of uniformity on this federal question.

III. THE "CONTEMPLATION OF THE PARTIES" TEST DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT CONSTRUING SECTION 2.

It is undisputed that this Court has interpreted Section 2 as a congressional declaration of a liberal federal policy favoring arbitration agreements. That interpretation has been recognized and applied by the Alabama Supreme Court. *See, e.g., Shearson Lehman Brothers, Inc. v. Crisp,* Case No. 1910090, 1992 Lexis 909 (August 14, 1992). In fact, on the same day the Alabama Supreme Court announced its adoption of the contemplation of the parties test in *Ex Parte Jones,* Case No. 1920249, 1993 Ala. Lexis 662 (July 16, 1993), it also released its opinion in *Continental Grain Company, Inc. v. Beasley,* Case No. 1920241, 1993 Ala. Lexis 669 (July 16, 1993). In *Continental Grain,* the Alabama Supreme Court held the Federal Arbitration Act to apply, based on the contemplation of the parties test, where chicken growers residing in Alabama sold their product in other states and countries. Although the growers argued that their contracts were performed entirely within Alabama, the court there held that they had contemplated substantial interstate activity.

This Court has not defined the precise limits of the field of operation of the Act. It has, however, rendered two decisions touching on that issue. In *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198 (1956), this Court had before it an employment contract between a New York corporation and a resident of New York who was being employed as a plant superintendent to work at a Vermont plant site operated by the company.[7] One of the issues before this Court was whether that contract evidenced a transaction involving commerce. This Court held that it did not because

> [t]here is no showing that petitioner, while performing his duties under the employment contract was working "in" commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions. *Id.* at 201 (footnote omitted).

Whatever other conclusions might be drawn from the decision in *Bernhardt*, it is clear that this Court construed the Act to mean that not all contracts are covered by the Act. That holding was also in the context of an employee being sent across state lines to work at a business or industrial site. Similarly, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court was presented with the question whether interstate commerce

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[7] These facts are largely gleaned from the opinion of the Court of Appeals in the same case, which was before the Supreme Court on certiorari. See *Bernhardt v. Polygraphic Co. of America*, 218 F.2d 948 (2d Cir. 1955).

was involved where the underlying transaction concerned a consulting agreement with a paint business having 175 wholesale clients in a number of states. The agreement secured the assistance of one of the parties "in arranging the transfer of manufacturing and selling operations from New Jersey to Maryland." *Id.* at 401 (footnote omitted). That transaction, this Court held, involved commerce. In so holding, the majority opinion rejected a dissenting opinion to the effect that the term "involving commerce" should be construed to apply only to "contracts between merchants for the interstate shipment of goods." *Id.* at 401, n.7.

Therefore, without prescribing any particular test or standard for other courts to follow in resolving this issue, this Court has ruled on two specific examples of transactions, one of which involves commerce and one of which does not. That some courts have chosen to structure their analysis of cases raising this issue in terms of what the parties contemplated their transaction to include does not appear to be inconsistent with the holding in either of these cases.[8] We would suggest that it is more important to examine the result obtained, based on any particular set of facts, rather than the method of reaching that result. As we demonstrated above, the result obtained in the cases relied on by Petitioners are remarkably uniform.

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[8] In fact, the concurring opinion of Judge Lumbard in *Metro Industrial*, which is the object of Petitioners' criticism in this case, was cited with approval by this Court in its opinion in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), wherein this Court quoted that concurring opinion concerning the purpose of the Act. *Southland*, 465 U.S. 1 at 13-14.

Petitioners rely heavily on *Perry v. Thomas*, 482 U.S. 483 (1987). That case does not, we would submit, hold that the Act evidences a congressional intent to enforce arbitration agreements "within the full reach of the Commerce Clause." We read *Perry* to hold that as to contracts which *are* covered by the Act, they are *exclusively* covered by the Act and that contrary state laws are preempted and, therefore, invalid. *Perry*, we would suggest, does not speak to the question of which contracts are covered by the Act, which is the issue here.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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